2001

Glenn Bass v. Planned Management Services, Inc. : Petition for Rehearing

Utah Supreme Court

Robert C. Fillerup; Attorney for Appellant.
Marinus Heymering, Jr.; Attorney for Petitioners.

19182

IN THE SUPREME COURT OF THE STATE OF UTAH

GLENN BASS and LOIS BASS,

Plaintiffs and Appellees

v.

PLANNED MANAGEMENT SERVICES, INC., a Utah corporation; George H. Rose; Majestic Meadows, a limited partnership, d/b/a Majestic Meadows Mobile Home Park; Tommy Spilker; Floyd Trimble; and Evelyn Trimble,

Defendants and Appellant

No. 19182

PETITION FOR REHEARING

APPEAL FROM A JUDGMENT
IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
The Honorable Christine M. Durham and
the Honorable Philip R. Fishler

MARINUS HEYMERING, JR.
2729 Kenton Drive
Salt Lake City, Utah 84109

Attorney for Petitioners
(Plaintiffs and Appellees)

ROBERT C. FILLERUP
1107 South Orem Blvd.
Orem, Utah 84058

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

GLENN BASS and LOIS BASS,	)	
Plaintiffs and Appellees	)	
v.	)	No. 19182
PLANNED MANAGEMENT SERVICES, INC., a Utah corporation; George H. Rose; Majestic Meadows, a limited partnership, d/b/a Majestic Meadows Mobile Home Park; Tommy Spilker; Floyd Trimble; and Evelyn Trimble,	)	
Defendants and Appellant	)	

PETITION FOR REHEARING

APPEAL FROM A JUDGMENT
IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
The Honorable Christine M. Durham and
the Honorable Philip R. Fishler

MARINUS HEYMERING, JR.
2729 Kenton Drive
Salt Lake City, Utah 84109

Attorney for Petitioners
(Plaintiffs and Appellees)

ROBERT C. FILLERUP
1107 South Orem Blvd.
Orem, Utah 84058

Attorney for Appellant

TABLE OF CONTENTS

	page
TABLE OF AUTHORITIES	ii
PETITION FOR REHEARING	1
CERTIFICATE OF COUNSEL	2
ARGUMENT	3
I. THE COURT OVERLOOKED CERTAIN MATERIAL FACTS THAT ESTABLISH PLAINTIFFS' CAUSE OF ACTION.	4
II. THE CIRCUMSTANCES OF THIS CASE WARRANT THE EXTENSION OR MODIFICATION OF EXISTING LAW.	7
A. PROOF OF SPECIAL DAMAGES SHOULD NO LONGER BE REQUIRED AS AN ELEMENT OF SLANDER OF TITLE WHERE THE TORT IS COMMITTED INTENTIONALLY.	7
B. ALTERNATIVELY, JUDGMENT SHOULD BE AWARDED TO THE PLAINTIFFS IN THIS CASE FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS.	10
C. SUBSTANTIAL PUNITIVE DAMAGES SHOULD BE AWARDED UNDER THE CIRCUMSTANCES OF THIS CASE DESPITE THE PAUCITY OF ACTUAL DAMAGES.	11
CONCLUSION	14
CERTIFICATE OF MAILING	15

TABLE OF AUTHORITIES

page

Bass v. Planned Management Services, Inc., No. 19182, slip op. (Utah August 18, 1988) 4, 7, 8, 13

Bennion v. Hanson, 699 P.2d 757 (Utah 1984) 6

Dowse v. Doris Trust Co., 116 Utah 106, 208 P.2d 956 (Utah 1949) 6, 11, 12, 13

Fauver v. Wilkoske, 123 Mont. 228, 211 P.2d 420 (Mont. 1949) 9, 13

Kesler v. Rogers, 542 P.2d 354 (Utah 1975) 12

Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982) 7, 10, 11, 12

McCollum v. Clothier, 121 Utah 311, 241 P.2d 468 (Utah 1952) 6

Nappe v. Anschelewitz, 97 N.J. 37, 477 A.2d 122 (N.J. 1984) 10,13

Nash v. Craigco, Inc., 585 P.2d 775 (Utah 1978) 12

Olsen v. Kidman, 120 Utah 443, 253 P.2d 510 (Utah 1951) 11

Paulson v. Kustom Enterprises, Inc., 157 Mont. 188, 483 P.2d 708 (Mont. 1971) 9

Prince v. Petersen, 538 P.2d 1325 (Utah 1975) 12

Sproule v. Parks, 116 Utah 368, 210 P.2d 436 (Utah 1949) 12

State v. Wade, 572 P.2d 398 (Utah 1977) 6

* * * * * * *

W. Prosser, Handbook on the Law of Torts, §7 at 28-29 (4th Ed. 1971) 8

Annot., 40 ALR4th 11 (1985) 14

Annot., 7 ALR4th 1220 (1981) 14

Annot., 30 ALR3d 1443 (1970) 14

Rule 54(c), Utah Rules of Civil Procedure 10

IN THE SUPREME COURT OF THE STATE OF UTAH

GLENN BASS and LOIS BASS, Plaintiffs and Appellees	)	
v.	)	No. 19182
PLANNED MANAGEMENT SERVICES, INC., a Utah corporation, et al., Defendants and Appellant	)	

PETITION FOR REHEARING

Glenn Bass and Lois Bass, plaintiffs and appellees herein, respectfully petition this Honorable Court for a rehearing of the above-entitled case. This petition is based on the grounds that

I. THE COURT OVERLOOKED CERTAIN MATERIAL FACTS THAT ESTABLISH PLAINTIFFS' CAUSE OF ACTION;

and, in addition,

II. THE CIRCUMSTANCES OF THIS CASE WARRANT THE EXTENSION OR MODIFICATION OF EXISTING LAW.

WHEREFORE, the plaintiffs and appellees herein pray that Part I of the judgment and opinion of this Honorable Court in this case (that the elements of slander of title were not made out) be re-examined and reversed.

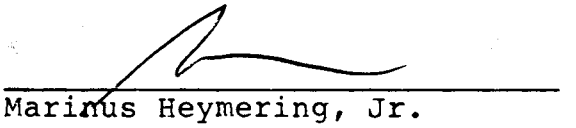
Respectfully submitted by

MARINUS HEYMERING, JR.
2729 Kenton Drive
Salt Lake City, Utah 84109

Attorney for Petitioners

CERTIFICATE OF COUNSEL

I, Marinus Heymering, Jr., counsel for plaintiffs and appellees herein, do certify by my signature below in accordance with the requirements of Rule 11 of the Utah Rules of Civil Procedure and Rule 35(a) of the Rules of the Utah Supreme Court that I have carefully examined and considered this petition for rehearing, know the contents hereof, and that in my opinion the same is well grounded in fact and is warranted by existing law and/or a good faith argument for the extension or modification of existing law and not for delay or any other improper purpose.



Marinus Heymering, Jr.
Attorney for Petitioners

ARGUMENT

Plaintiffs and appellees respectfully submit that this Honorable Court overlooked certain material facts and that the circumstances of this case warrant the extension or modification of existing law.

Clearly existing Utah law requires the plaintiff in an action for slander of title to prove special damages, i.e., palpable economic loss. Equally clear is that attorney fees may not serve that purpose when they are incurred in the prosecution of that action, but only when they have already been incurred of necessity to remove an impediment or to correct a harm caused by the slander, as in an action for quiet title to remove a specious lien. In this respect, Justice Stewart's opinion, in which the rest of the court joined unanimously, cannot be faulted.

However, the emphasis in the briefs and at oral argument before this Honorable Court on the issue of attorney fees may well have served to obscure the fact that other special damages were proved at trial as an element of the slander of title cause of action. Thus, the cause of action was in fact made out.

Additionally, where (as is the case here) actual harm has resulted from the intentional commission of an economic tort, the law should allow an award of punitive damages, and it should do

so even if the amount or extent of actual damage cannot be ascertained in money value. Thus, the trial court's award of $8,000 in attorney fees on the slander of title should be upheld as punitive damages constituting a reasonable punishment and deterrent for such conduct in this case.

I. THE COURT OVERLOOKED CERTAIN MATERIAL FACTS THAT ESTABLISH PLAINTIFFS' CAUSE OF ACTION.

The material facts are as follows. In August 1978 the Basses had an option to buy the defendants Trimbles' mobile home. Bass v. Planned Management Services, Inc., No. 19182, slip op. at 1 (Utah August 18, 1988). The option was good until October 31, 1978. Id. at 1. In August 1978 the Basses employed a real estate agent to sell the mobile home. Id. at 2. Defendant Tommy Spilker testified that he told some prospective buyers that legal problems needed to be straightened out before they bought the home. Id. at 2. (At the time, Spilker was a servant of defendant Planned Management Services (PMS). Id. at 1, 2.) Additionally, Spilker changed the locks on the mobile home and removed the real estate agent's lockbox in mid-October 1978, which denied the Basses and their real estate agent access to the home. Id. at 2, 5. When the Basses' option to buy expired at the end of October 1978 the Trimbles reposessed the mobile home and engaged Spilker to sell it, which he did shortly thereafter. Id. at 2.

The trial court found as a fact, both before and after PMS filed its objections to the findings of fact, conclusions of law and judgment of the trial court, that Spilker made false statements about the property to at least one potential buyer with the intent to prevent the Basses from selling it. Record at 120-121, 161. Likewise the trial court found as a fact, both before and after PMS' objection, that Spilker changed the locks on the mobile home and removed the lockbox with the intent to prevent the Basses from selling it. Record at 120-121, 161.

Spilker's actions in changing the locks and removing the lockbox without privilege to do so spoke even louder than his words the (false) assertion that the Basses had no right to possess or sell the mobile home. This assertion was not only false but it also disparaged the Basses' legitimate title interest in the mobile home and it cast a larger and more definite cloud over the Basses' title interest than the filing of a wrongful lien would have. The assertion was also clearly malicious because it was made with the intent to prevent the Basses from selling the mobile home, and because it evidenced a clear disregard for the Basses' title interest and an intent to vex them and injure their prospective economic interests.[1]

---

[1]. Judge Durham did state from the bench at the conclusion of the trial that: "The court further finds that Mr. Spilker interfered with the Basses' efforts to sell their trailer home prior to November 1, 1978, and I can make no finding that that was malicious, willful or wanton." Record at 601. The trial court's oral comments from the bench have no force or effect.

(continued...)

The assertion was published (made known) at least with respect to the Basses' real estate agent, who was forced thereby to crawl through a window in order to gain entry to the mobile home. Spilker's act of slander also directly and proximately caused certain special damages in that the Basses were wrongfully dispossesed (and thereby prevented from showing the home to prospective buyers) for a period of 10 days. Their actual pecuniary damages were calculated to be $76.70 based upon the actual rental value of the home. Thus all the elements of a slander of title cause of action were made out.

The fact that the mobile home sold at a net profit of $7,170.80 (Record at 121, 161) shortly after Spilker was engaged to sell it is evidence that there was also a palpable loss of prospective economic gain even though the trial court did not find that the Basses' failure to sell the property was proximately caused by Spilker's actions.[2] A ready market existed. The fact that Spilker and his principal (PMS) promptly profited from the sale of the same property that Spilker

---

[1](...continued)
See, e.g., Bennion v. Hanson, 699 P.2d 757, 760 (Utah 1984); State v. Wade, 572 P.2d 398, 399 n.3 (Utah 1977); and McCollum v. Clothier, 121 Utah 311, 241 P.2d 468, 472 (Utah 1952). She took the matter under advisement and later issued a memorandum opinion in which she specifically found that "Spilker's changing of the locks was not in good faith." Record at 121. Her finding was reaffirmed by Judge Fishler after PMS objected. Record at 161.

[2]. Proof of the loss of any sale of the slandered property is not required to sustain an action for slander of title in Utah. Dowse v. Doris Trust, 116 Utah 106, 208 P.2d 956, 959 (Utah 1949). A fortiori, proof that defendant's actions caused such a loss is not required to sustain the action.

slandered while the Basses were entitled to posess and sell it makes his conduct all the more reprehensible.

II. THE CIRCUMSTANCES OF THIS CASE WARRANT THE EXTENSION OR MODIFICATION OF EXISTING LAW.

As Justice Stewart correctly observed, the essence of slander of title is the interference with economic interests rather than any injury to reputation. Bass, slip op. at 3-4. It is the policy of Utah, as indeed it should be, to protect the economic interests of its citizens from interference. For example, this Honorable Court recently recognized the common law tort of intentional interference with prospective economic relations. Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982). In light of this and other developments in the law, the circumstances of this case warrant the following extensions or modifications of existing law.

A. PROOF OF SPECIAL DAMAGES SHOULD NO LONGER BE REQUIRED AS AN ELEMENT OF SLANDER OF TITLE WHERE THE TORT IS COMMITTED INTENTIONALLY.

The existing law of slander of title requires proof of special damages in order to prevail. There are no general or presumed damages in this cause of action. The reason for this lies principally in the antiquated distinction between trespass and trespass on the case. "[W]hether such [actual] damage is essential to the existence of a cause of action for a particular

tort may depend largely upon its ancestry in terms of old procedure." W. Prosser, Handbook on the Law of Torts, §7 at 28-29 (4th Ed. 1971).

The existing law of slander of title may work well enough when the title involved is fee simple and the plaintiff can (or indeed must) bring an action to remove the harm of the slander. In such a case the plaintiff can show either that he lost a sale (and the actual amount of profit he would have made) or that he is out of pocket to remove the impediment (by an amount certain), or else he has spent nothing, has lost nothing, and still holds the title. He may yet profit from it, and thus he is not yet damaged.

The existing law does not work, however, where the title involved is for a term of years (or months) for then one may slander the title with impunity and deter such buyers as might otherwise be interested until the term expires. At that point, unless the plaintiff can show particular losses or out of pocket expenses proximately caused by defendant's slander, the law allows no redress. It considers the harm to be abated and the plaintiff to be undamaged. See Bass, slip op. at 4 ("plaintiffs inchoate or possessory rights could not have been damaged"). In fact, the harm has not ceased at that point; rather the harm has become irreparable. The plaintiffs have lost both their economic opportunity and their title.

The facts in this case show that defendant PMS, through its servant Tommy Spilker, took several affirmative actions with the intent to prevent the Basses from selling the mobile home. The Basses were unable to sell the mobile home (whether or not proximately caused by defendants' actions). PMS profited from Spilker's sale of the mobile home shortly after the Basses' interest (option to buy) expired. The harm intended (and not merely wished for) by defendants did occur. The Basses' loss is actual (if not quantifiable) and the defendants profited from Spilker's conduct, which was improper both in purpose (to frustrate the Basses' right to sell) and in means (e.g., changing the locks without privilege to do so).

Whether or not it finds that the facts discussed above in Point I show actual damages in connection with the slander of title cause of action, this Honorable Court should find that the egregious nature of defendant Spilker's intentional conduct warrants judgment for the plaintiffs for slander of title. Other courts have already shown the way. See Paulson v. Kustom Enterprises, Inc., 157 Mont. 188, 483 P.2d 708, 716 (Mont. 1971) (involving an action for slander of title and citing as the existing law of Montana Fauver v. Wilkoske, 123 Mont. 228, 211 P.2d 420 (Mont. 1949) for the proposition that punitive damages may be awarded even though the amount or extent of actual damages cannot be shown; a fortiori a cause of action would be made out).

New Jersey has abandoned the requirement of proving special damages to sustain a cause of action for an intentional tort.

> * * * [T]he requirement of actual damages to sustain a cause of action for intentional torts no longer serves a useful purpose, at least where the victim of an intentional wrong has suffered some loss, detriment or injury but is unable to prove compensatory damages. * * * We hold, therefore, that compensatory damages are not an essential element of an intentional tort committed wilfully and without justification when there is some loss, detriment or injury * * *.

Nappe v. Anschelewitz, 97 N.J. 37, 477 A.2d 1224, 1229 (N.J. 1984) (action for fraud).

B. ALTERNATIVELY, JUDGMENT SHOULD BE AWARDED TO THE PLAINTIFFS IN THIS CASE FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS.

Alternatively, this Honorable Court should consider whether the facts of this case support a judgment for plaintiffs for intentional interference with prospective economic relations. Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 301, 305 (Utah 1982) (in which this Honorable Court found that Isom failed to prove intentional interference with contract but sustained the verdict for Isom for intentional interference with prospective economic relations, which common law cause of action it explicitly recognized for the first time in this case. Id. at 304); Rule 54(c), Utah Rules of Civil Procedure ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled").

The elements of a cause of action for intentional interference with prospective economic relations are "(1) that the defendant intentionally interfered with plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." Leigh Furniture, supra 657 P.2d at 304. In this case, defendant Spilker intentionally interfered with both the Basses' present right to posess and with their potential economic gain from the sale of the mobile home. Record at 120-121, 161. Spilker did so both with an improper motive (to frustrate the Basses' right to sell) and by improper means (false remarks in derogation of the Basses' title; changing the locks in derogation of the Basses' title). Id. Spilker's actions caused injury to the Basses: not only actual damages of $76.70 for 10 days' disposession, but also irreparable harm for the frustration of their potential to profit from the sale of the mobile home.

C. SUBSTANTIAL PUNITIVE DAMAGES SHOULD BE AWARDED UNDER THE CIRCUMSTANCES OF THIS CASE DESPITE THE PAUCITY OF ACTUAL DAMAGES.

It is well settled that punitive damages may be awarded in actions for slander of title. Olsen v. Kidman, 120 Utah 443, 253 P.2d 510 (Utah 1951); Dowse v. Doris Trust, 116 Utah 106, 208 P.2d 956 (Utah 1949). Punitive damages may also be awarded in actions for intentional interference with prospective economic relations. Leigh Furniture, supra 657 P.2d at 312-313.

The general rule in Utah is that the purposes of punitive damages are:

> * * * [A] punishment of the defendant for particularly grievous injury caused by conduct which is not only wrongful, but which is wilfull and malicious so that it seems to one's sense of justice that mere recompense for actual loss is inadequate and that the plaintiff should have added compensation; and that the defendant should suffer some additional penalty for that character of wrongful conduct; and also that such a verdict should serve as a wholesome warning to others not to engage in similar misdoings.

Kesler v. Rogers, 542 P.2d 354, 359 (Utah 1975) quoted with approval in Leigh Furniture, supra 657 P.2d at 312. The general rule in Utah is also that the amount of punitive damages awarded should ordinarily bear some reasonable (aliquot) relation to the award of compensatory damages (Prince v. Petersen, 538 P.2d 1325 (Utah 1975)), but such a consideration is only one among many. Leigh Furniture, supra 657 P.2d at 312.

The facts adduced at trial support an award of substantial punitive damages in this case pursuant to the policy set forth in Kesler v. Rogers, supra. Olson v. Kidman, 120 Utah 443, 235 P.2d 510 (Utah 1951); Dowse v. Doris Trust Co., 116 Utah 106, 208 P.2d 956 (Utah 1949); cf. Sproule v. Parks, 116 Utah 368, 210 P.2d 436 (Utah 1949) (punitive damages not awarded on appeal where they were not awarded at trial).[3] But see Nash v. Craigco, Inc., 585

---

[3]. Justice Stewart's opinion in this case characterizes the trial court's award of attorney fees as "special damages" and "gratuitous." Bass, slip op. at 4. In fact, although the record would support such an inference, it is not at all clear that the award of attorney fees was intended to be compensatory. The (continued...)

P.2d 775 (Utah 1978) (action in equity) (in which this Honorable Court reversed the trial court's denial of punitive damages and stated that the amount of punitive damages should be determined from the nature of the conduct rather than the amount of compensatory damages).

Some courts have held that punitive damages may be awarded even in the absence of actual or compensatory damages. See, e.g., Nappe v. Anschelewitz, 97 N.J. 37, 477 A.2d 1224 (N.J. 1984); Fauver v. Wilkoske, 123 Mont. 228, 211 P.2d 420 (Mont. 1949).

> Because of the fortuitous circumstances that an injured plaintiff failed to prove compensatory damages, the defendant should not be freed of responsibility for aggravated misconduct. People should not be able with impunity to trench upon a right.

Nappe v. Anschelewitz, supra 477 A.2d at 1231.

Whether or not it finds that the facts discussed above in Point I show actual (special) damages in connection with a cause of action for slander of title or intentional interference with prospective economic relations, this Honorable Court should award

---

[3](...continued)
trial court's memorandum opinion states simply that "Plaintiffs are entitled to judgment * * * for attorney's fees on the slander of title (See Dowse v. Doris Trust Co., 116 U. 107 (1949))." Record at 122. It is also plausible, though equally unclear, that the award was intended to be punitive. The amount to be awarded for attorney fees was still subject to proof when the trial court's memorandum opinion was filed. Id. It is difficult to conceive that such unliquidated damages would be considered special damages.

substantial punitive damages to plaintiff. A reasonable measure of punitive damages in this case is the sum of $8000 awarded by the trial court. See generally Annot., 40 ALR4th 11, §4 at 28-33, §15 at 88-93, and §16(e) at 99-101 (1985); Annot., 7 ALR4th 1220 (1981); and Annot., 30 ALR3d 1443 (1970).

CONCLUSION

For all of the foregoing reasons, plaintiffs and appellees pray this Honorable Court to grant their petition for rehearing, reverse its decision with respect to its finding of no cause for slander of title, and reinstate the trial court's award of $8000 plus interest as punitive damages.

RESPECTFULLY SUBMITTED this 31st day of August, 1988.

MARINUS HEYMERING, JR.

Attorney for Petitioners
(Plaintiffs and Appellees)

CERTIFICATE OF MAILING

I hereby certify that, in compliance with Rules 35(a) and 26(b) of the Rules of the Utah Supreme Court, I mailed four (4) copies of the foregoing petition for rehearing to Mr. Robert C. Fillerup, Attorney for Appellants, 1107 South Orem Boulevard, Orem, Utah 84058, postage prepaid this 31st day of August, 1988.

Marinus Heymering, Jr.